

1 ENERGY AND ENVIRONMENT CABINET

2 Department for Environmental Protection

3 Division of Waste Management

4 (New Administrative Regulation)

5 401 KAR 101:020. Financial requirements.

6 RELATES TO: KRS 224.01-410

7 STATUTORY AUTHORITY: KRS 224.01-410

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.01-410 authorizes the
9 cabinet to certify contractors for the cleanup of contaminated methamphetamine properties. This
10 administrative regulation establishes the financial assurance requirements for certified contractors.

11 Section 1. Applicability. (1) This administrative regulation applies to contractors who
12 became certified by the cabinet to clean up methamphetamine contaminated properties after July
13 15, 2008.

14 (2) Contractors certified, by the cabinet to clean up methamphetamine contaminated
15 properties, prior to July 15, 2008 who do not maintain financial assurance shall meet the
16 requirements of this administrative regulation, to continue to be certified to clean up
17 methamphetamine contaminated properties.

18 Section 2. Financial Assurance Criteria. (1)(a) The financial assurance criteria and bond
19 requirements apply to each contractor certified by the cabinet to engage in the decontamination of
20 contaminated properties that were used for the production or processing of methamphetamine.

(b) The financial assurance shall apply to employees of a company that is certified by the cabinet.

(2) Prior to the issuance of a certification to provide decontamination services, financial assurance shall be:

(a) Submitted;

(b) Reviewed; and

(c) Approved by the cabinet.

Section 3. Financial Assurance Amounts. (1) A contractor certified by the cabinet shall provide financial assurance corresponding to the level of contamination of the inhabitable property.

(a) A contractor applying for certification to clean up contaminated property assessed as a Tier 1, Tier 2 or Tier 3 level of contamination shall post and maintain financial assurance in the amount of \$100,000.00.

(b) A contractor applying for certification to clean up contaminated property assessed as a Tier 4 level of contamination shall post and maintain financial assurance in the amount of \$250,000.00.

(2)(a) A contractor who became certified with the cabinet prior to July 15, 2008 shall be required to maintain the \$50,000.00 financial assurance regardless of the tier level of cleanup.

(b) A contractor who became certified with the cabinet prior to July 15, 2008, who does not maintain the \$50,000.00 financial assurance, shall meet the requirements of subsection (1) of this section.

Section 4. Financial Mechanisms. (1) The mechanisms used to demonstrate financial assurance under this administrative regulation shall ensure that the funds necessary to meet the

costs of clean up of contaminated properties shall be available within thirty (30) days of the issuance of a cabinet demand letter.

(2) The certified contractor shall execute and submit a performance agreement, as specified in Sections 5 and 6 of this administrative regulation, with one (1) or more of the financial mechanisms in Sections 7 through 11 of this administrative regulation that satisfies the following criteria:

(a) The amount of financial assurance obtained from a single financial institution shall not exceed the limit of federal insurance, if the assurance is provided by a financial institution that uses federal insurance to guarantee the availability of funds.

(b) The cabinet shall demand forfeiture of the financial assurance if the certified contractor fails to act with reasonable care and judgment in the performance of decontamination services or is fraudulent or deceitful in the submission of inaccurate data or qualifications.

Section 5. Performance Agreement. Before the cabinet issues a certification, the applicant shall complete the following:

(1) Execute and submit a performance agreement pursuant to Section 6 of this regulation; and

(2) Post at least one (1) of the following financial assurance mechanisms pursuant to KRS 224.01-410:

(a) A surety bond as specified in Section 7 of this administrative regulation;

(b) A letter of credit as specified in Section 8 of this administrative regulation;

(c) An escrow agreement as specified in Section 9 of this administrative regulation;

(d) A financial self-insurance test as specified in Section 10 of this administrative regulation; or

1 (e) A corporate guarantee as specified in Section 11 of this administrative regulation.

2 Section 6. Wording of the Performance Agreement. A performance agreement,
3 guaranteeing performance of cleanup to allowable limits, shall be executed on Performance
4 Agreement, DEP 6079D, January 2009.

5 Section 7. Wording of Surety Bond. (1) A surety bond shall be executed on Surety Bond,
6 DEP 6079B, January 2009.

7 (2)(a) To be eligible to issue a surety bond, a surety shall be listed as acceptable in the
8 current edition of U.S. Treasury Circular 570.

9 (b) The penal sum of the bond shall not exceed the amount of the surety's underwriting
10 limitation.

11 Section 8. Wording of the Instrument for a Letter of Credit. A letter of credit shall be
12 executed on Irrevocable Letter of Credit, DEP 6079C, January 2009.

13 Section 9. Wording of the Escrow Agreement. (1) An escrow agreement shall be executed
14 on Escrow Agreement, DEP 6079E, January 2009.

15 (2) If a certificate of deposit is used in conjunction with the escrow agreement, it shall be
16 made payable to the financial institution as the escrow agent.

17 Section 10. Wording of a Financial Self-Insurance Test. (1) A financial self-insurance test,
18 shall be executed on Financial Self-Insurance Test, DEP 6079F, January 2009.

19 (2) The applicant may satisfy the requirements of this administrative regulation by passing
20 a financial test as specified in this section. The applicant shall meet the criteria set forth in
21 paragraph (a) or (b) of this subsection:

22 (a) Less than fifty (50) percent of the applicants personal gross revenues are derived from
23 contaminated methamphetamine cleanup operations and the applicant shall have:

1. Satisfaction of at least two (2) of the following ratios:
 - a. A ratio of total liabilities to net worth less than two and zero tenths (2.0);
 - b. A ratio of the sum of net income plus depreciation, depletion, and amortization to total liability greater than one-tenth (0.1); or
 - c. A ratio of current assets to current liabilities greater than one and five-tenths (1.5);
2. Net working capital and tangible net worth each at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation; or
- (b) Tangible net worth of at least three (3) million dollars.
- (3) To demonstrate that requirements of this test are met, the applicant shall submit the following items to the cabinet:
 - (a) A letter signed by the applicant and worded as specified on Financial Self-Insurance Test, DEP 6079F, January 2009;
 - (b) A copy of a report by an independent certified public accountant examining the applicant's financial statements for the company's most recently completed fiscal year; and
 - (c) A special report from the applicant's independent certified public accountant to the applicant stating that:
 1. The auditor has compared the data that the letter from the applicant specified as having been derived from the independently audited year-end financial statements for the most recent fiscal year with the amounts in financial statements; and
 2. In connection with the above subparagraph procedure, if matters did not come to the auditor's attention that caused the auditor to believe that the specified data should be adjusted.

1 (4)(a) After the initial submission of the items specified in subsection (3) of this section, the
2 applicant shall send updated information to the cabinet not later than ninety (90) days after the
3 close of each succeeding fiscal year.

4 (b) This information shall include all three (3) items specified in subsection (3) of this
5 section.

6 (5)(a) If the applicant no longer meets the requirements of subsection (2) of this section,
7 notice shall be sent to the cabinet of the intent to establish alternate financial assurance, as
8 specified in this administrative regulation.

9 (b) The notice shall be sent by certified mail not later than ninety (90) days after the end of
10 the fiscal year for which the year-end financial data show that the owner or operator no longer
11 meets the requirements.

12 (c) The applicant shall provide that alternate financial assurance not later than 120 days
13 after the end of that fiscal year.

14 (6)(a) The cabinet may, based on a reasonable belief that the applicant no longer meets the
15 requirements of this section, require reports of financial condition at any time from the applicant in
16 addition to those specified in subsection (2) of this section.

17 (b) If the cabinet finds, on the basis of these reports or other information, that the applicant
18 no longer meets the requirements of subsection (2) of this section, the applicant shall provide
19 alternate financial assurance as specified in this administrative regulation not later than thirty (30)
20 days after notification of this finding.

21 (7)(a) The cabinet may disallow use of the financial self-insurance test on the basis of
22 qualifications in the opinion expressed by the independent certified public accountant in his report
23 on examination of the applicant's financial statements.

(b) An adverse opinion or disclaimer of opinion by the independent certified public accountant shall be cause for disallowance.

(c) The applicant shall provide alternate financial assurance as specified in this administrative regulation not later than thirty (30) days after notification of the disallowance.

(8) The applicant is no longer required to submit the items specified in subsection (2) of this section when the applicant substitutes alternative financial assurance as specified in this administrative regulation.

Section 11. Wording of a Corporate Guarantee. (1) A corporate guarantee shall be executed on Corporate Guarantee, DEP 6079G, January 2009.

(2) The applicant may satisfy the requirements of this administrative regulation by passing a financial test to offer a corporate guarantee sufficient to provide the financial assurance as specified in this section. The applicant shall meet the criteria established in paragraph (a), or (b) of this subsection:

(a) Less than fifty (50) percent of the applicants corporate gross revenues shall be derived from contaminated methamphetamine cleanup operations; or

(b) The applicant shall have:

1. Satisfaction of at least two (2) of the following ratios:

a. A ratio of total liabilities to net worth less than two and zero tenths (2.0);

b. A ratio of the sum of net income plus depreciation, depletion, and amortization to total liability greater than one-tenth (0.1); or

c. A ratio of current assets to current liabilities greater than one and five-tenths (1.5);

2. Net working capital and tangible net worth each at least six (6) times the amount of financial assurance required in Section 3 of this administrative regulation; or

1 3. Tangible net worth of at least ten (10) million dollars.

2 4. Assets in the United States amounting to at least ninety (90) percent of total assets or at
3 least six (6) times the amount of financial assurance required in Section 3 of this administrative
4 regulation.

5 5.a. A current rating for his or her most recent bond issuance of AAA, AA, A, or BBB as
6 issued by "Standard and Poor's" or AAA, AA, A, or BAA as issued by "Moody's";

7 b. Tangible net worth as least six (6) times the amount of financial assurance required in
8 Section 3 of this administrative regulation;

9 c. Tangible net worth of at least ten (10) million dollars; and

10 d. Assets located in the United States amounting to at least ninety (90) percent of total
11 assets or at least six (6) times the amount of financial assurance required in Section 3 of this
12 administrative regulation.

13 (3) To demonstrate that requirements of this test are met, the applicant shall submit the
14 following items to the cabinet:

15 (a) A letter signed by the applicant's chief financial officer and worded as specified on DEP
16 Form 6079G;

17 (b) A copy of a report by an independent certified public accountant examining the
18 applicant's financial statements for the most recently completed fiscal year; and

19 (c) A special report from the applicant's independent certified public accountant to the
20 applicant stating that:

21 1. The auditor has compared the data that the letter from the chief financial officer specified
22 as having been derived from the independently audited year-end financial statements for the most
23 recent fiscal year with the amounts in such financial statements; and

2. In connection with the above subparagraph procedure, if no matters came to the auditor's attention that caused the auditor to believe that the specified data should be adjusted.

(4)(a) After the initial submission of the items specified in subsection (3) of this section, the applicant shall send updated information to the cabinet not later than ninety (90) days after the close of each succeeding fiscal year.

(b) This information shall include all three (3) items specified in subsection (3) of this section.

(5)(a) If the applicant no longer meets the requirements of subsection (2) of this section, notice shall be sent to the cabinet of the intent to establish alternate financial assurance, as specified in this administrative regulation.

(b) The notice shall be sent by certified mail not later than ninety (90) days after the end of the fiscal year for which the year-end financial data show that the applicant no longer meets the requirements.

(c) The applicant shall provide that alternate financial assurance not later than 120 days after the end of that fiscal year.

(6)(a) The cabinet may, based on a reasonable belief that the applicant no longer meets the requirements of subsection (2) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (3) of this section.

(b) If the cabinet finds, on the basis of these reports or other information, that the applicant no longer meets the requirements of subsection (2) of this section, the applicant shall provide alternate financial assurance as established in this administrative regulation not later than thirty (30) days after notification of this a finding.

1 (7)(a) The cabinet may disallow use of this test on the basis of qualifications in the opinion
2 expressed by the independent certified public accountant in his report on examination of the
3 applicant's financial statements.

4 (b) An adverse opinion or disclaimer of opinion shall be cause for disallowance.

5 (c) The applicant shall provide alternate financial assurance as specified in this
6 administrative regulation not later than thirty (30) days after notification of the disallowance.

7 (8) The applicant is no longer required to submit the items specified in subsection (3) of
8 this section if the applicant substitutes alternative financial assurance as established in this
9 administrative regulation; or

10 (9)(a) The applicant may meet the requirements of this section by obtaining a written
11 guarantee, hereafter referred to as a "parent corporate guarantee".

12 (b) The guarantor shall be the parent corporation of the certified contractor as defined in
13 Section 10 of this administrative regulation.

14 (c) The guarantor shall meet the requirements for applicants in subsections (2) to (7) of this
15 section and shall comply with the terms of DEP Form 6079G.

16 (d)1. The parent corporate guarantee shall accompany the items sent to the cabinet as
17 specified in subsection (3) of this section.

18 2. The terms of the parent corporate guarantee shall provide that:

19 a. If the applicant fails to perform decontamination of a contaminated inhabitable property
20 to the decontamination standards established in 401 KAR 101:040, the guarantor shall do so or
21 shall establish a trust fund, in the name of the applicant, as specified in Section 10 of this
22 administrative regulation;

1 b. The parent corporate guarantee shall remain in force unless the guarantor sends notice of
2 cancellation by certified mail to the applicant and to the cabinet; and

3 c. Cancellation shall not occur, during the 120-day period beginning on the first day that
4 both the applicant and the cabinet have received notice of cancellation, as evidenced by the
5 certified mail return receipts.

6 (e) If the applicant fails to provide alternate financial assurance as specified in this
7 administrative regulation, and fails to obtain the written approval of this alternate financial
8 assurance from the cabinet not later than ninety (90) days after both the contractor and the cabinet
9 have received notice of cancellation of the parent corporate guarantee from the guarantor, the
10 guarantor shall provide the alternate financial assurance in the name of the certified contractor.

11 Section 12. Use of Multiple Financial Mechanisms. (1)(a) The applicant may satisfy the
12 requirements of this administrative regulation by establishing more than one (1) financial
13 mechanism.

14 (b) These mechanisms shall be limited to the following:

15 1. Surety bonds;

16 2. Letters of credit;

17 3. Escrow agreements;

18 4. Financial self-insurance test; or

19 5. Corporate guarantee.

20 (2) The mechanisms shall be as specified in Sections 6 to 11 of this administrative
21 regulation respectively, except that it is the combination of mechanisms, rather than each single
22 mechanism, that shall provide financial assurance for an amount at least equal to the financial
23 assurance amounts specified in Section 2 of this administrative regulation.

Section 13. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Performance Agreement", DEP 6079D, January 2009;

(b) "Surety Bond", DEP 6079B, January 2009;

(c) "Irrevocable Letter of Credit", DEP 6079C, January 2009;

(d) "Escrow Agreement", DEP 6079E, January 2009;

(e) "Financial Self-Insurance Test", DEP 6079F, January 2009; and

(f) "Corporate Guarantee", DEP 6079G, January 2009.

(2) This material may be inspected, copied, or obtained, subject too applicable copyright law, at Division of Waste Management, 200 Fair Oaks, 2nd Floor, Frankfort, Kentucky, 40601, Monday through Friday, 8:00 a.m. to 4:30 p.m.

(3) This material may also be obtained at the division's website at www.waste.ky.gov.

401 KAR 101:020 approved for filing.

Date

Hank List, Deputy Secretary
Signing for
Leonard K. Peters, Secretary
Energy and Environment Cabinet

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on February 24, 2009 at 10:00 A.M. (Eastern Time) at 300 Fair Oaks Lane, Frankfort, KY 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by February 17, 2009, five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until March 2, 2009. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Tim Hubbard, Assistant Director
Division of Waste Management
200 Fair Oaks, 2nd Floor
Frankfort, KY 40601
Telephone: (502) 564-6716 Fax (502) 564-4049
Email: Tim.Hubbard@ky.gov

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Tim Hubbard, Assistant Director

- (1) Provide a brief summary of:
 - (a) What this administrative regulation does:
This administrative regulation establishes the financial assurance requirements for certified contractors.
 - (b) The necessity of this administrative regulation:
This administrative regulation is necessary to establish the financial assurance requirements for certified contractors.
 - (c) How this administrative regulation conforms to the content of the authorizing statutes:
This administrative regulation conforms to the content of the authorizing statute by establishing the financial assurance requirements for certified contractors who clean up methamphetamine contaminated properties.
 - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:
This administrative regulation will assist in the effective administration of the statute by establishing criteria for certified contractors who clean up methamphetamine contaminated properties.
- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
 - (a) How the amendment will change this existing administrative regulation:
This is a new administrative regulation.
 - (b) The necessity of the amendment to this administrative regulation:
This is a new administrative regulation.
 - (c) How the amendment conforms to the content of the authorizing statutes:
This is a new administrative regulation.
 - (d) How the amendment will assist in the effective administration of the statutes:
This is a new administrative regulation.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:
This administrative regulation affects individuals who want to become certified contractors for the cleanup of methamphetamine contaminated properties.
- (4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:
 - (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:
Individuals who are wishing to become certified contractors will have to meet the requirements of Sections 2 through 4 of this administrative regulation.
 - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):
Contractors will also have to post financial assurance for \$100,000 for Tiers 1 through 3 and \$250,000 for Tier 4 cleanups. The cost associated with posting financial assurance will vary depending on the financial mechanism the contractor chooses.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in

question (3):

This will generate revenue for the contractors who become certified to clean up methamphetamine contaminated properties.

- (5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

To implement this administrative regulation initially it will cost \$12,000.00 - \$13,000.00.

(b) On a continuing basis:

To implement this administrative regulation on a continuing basis it will cost \$1,000.00-\$1,500.00.

- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

The Division of Waste Management applies for a federal EPA Targeted Brownfield Assistance (TBA) grant, which is used to cover the administrative costs of this program.

- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

There are no fees associated with this administrative regulation.

- (8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees:

There are no fees associated with this administrative regulation.

- (9) TIERING: Is tiering applied? (Explain why or why not)

Tiering is applied to financial assurance requirements for certified contractors all other requirements are the same. The financial assurance requirements are tiered because of the additional hazards associated with increased levels of contamination in the higher tiered response levels.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 401 KAR 101:020

Contact Person: Tim Hubbard, Assistant Director

1. Does this administrative regulation relate to any program, service, or requirements of a state or local government (including cities, counties, fire departments, or school districts)?
Yes x No _____
If yes, complete questions 2-4.
2. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?
Kentucky State Police, local law enforcement agencies, Cabinet for Health and Family Services Department for Public Health, and local health departments will be impacted.
3. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 224.01-410
4. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.
 - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?
This is the financial requirements regulation and should not generate revenue.
 - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?
This is the financial requirements regulation and should not generate revenue.
 - (c) How much will it cost to administer this program for the first year?
To implement this administrative regulation initially it will cost \$12,000.00 - \$13,000.00.
 - (d) How much will it cost to administer this program for subsequent years?
To implement this administrative regulation on a continuing basis it will cost \$1,000.00-\$1,500.00.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

DETAILED SUMMARY OF MATERIAL INCORPORATED BY REFERENCE

I. This administrative regulation incorporates by reference the Performance Agreement, DEP 6079D, January 2009. This document acts as a promissory note linking the financial assurance instrument to the permit.

This document consists of 3 pages

II. This administrative regulation incorporates by reference the Surety Bond, DEP 6079B, January 2009. This document is a contract for a sum certain provided by a third party against the performance of another party.

This document consists of 4 pages

III. This administrative regulation incorporates by reference the Irrevocable Letter of Credit, DEP 6079C, January 2009. This document is a letter to guarantee of payment of loan proceeds provided by a bank.

This document consists of 3 pages

IV. This administrative regulation incorporates by reference the Escrow Agreement, DEP 6079E, January 2009. This is contract in which a bank acts as an agent holding a certain sum in cash or certificates of deposit.

This document consists of 6 pages

V. This administrative regulation incorporates by reference the Financial Self-Insurance Test, DEP 6079F, January 2009. This document is a financial self-insurance provided by a company based on a certain margin of liquidity and debt.

This document consists of 4 pages

VI. This administrative regulation incorporates by reference the Corporate Guarantee, DEP 6079G, January 2009. This document is a form of financial assurance provided by a parent corporation for the benefit of a subsidiary.

This document consists of 4 pages

